

LFC Requester:**Kelly Klundt**

**AGENCY BILL ANALYSIS
2016 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original X **Amendment**

Correction **Substitute**

Date January 19, 2016

Bill No: HB 65

Sponsor: Rep. Maestas Barnes & Rep.

Agency Code: 305

Short Child Porn Images as Individual

Person Writing Tony Long, AAG

Title: Offenses

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY – House Bill 65 is proposed legislation relating to child exploitation; making each separate depiction of a child chargeable as an individual criminal offense; revising definitions in the sexual exploitation of children act; adding an enhancement for an offense against a child under the age of thirteen; declaring an emergency.

Synopsis: Summary of Bill

HB 65 seeks to amend sections 30-6A-2 and 30-6A-3 of the Criminal Code by making each depiction of a child engaged in a prohibited sex act an individual offense and revising the definitions of “visual or print medium” and “prohibited sexual act.”

The bill not only adds a new subsection (H) to 30-6A-3 stating “that for the purposes of the section, the possession, distribution or manufacture of each separate depiction of a child under eighteen years of age engaged in a prohibited sexual act contained on an item of visual or print medium shall be considered a distinct act and may be charged as an individual criminal offense pursuant to the relevant subsection of the statute,” it also revises the definition of visual or print medium by adding the language “any single visual depiction of a prohibited sexual act” to 30-6A-2 (B)(1) and 30-6A-2(B)(2) and the language “created or stored.”

The bill states that images “may” be charged as additional criminal offenses although they “shall” be considered a distinct act, allowing for discretionary charging as a matter of practice as was done by prosecutors prior to the Supreme Court decision in *State v. Olssen/Ballard* (addressed below).

The bill amends the definition of “prohibited sexual act” in section 30-6A-2 to include “a simulation of any of the acts provided in paragraphs (1) through (5).” In the current version of section 30-6A-3, simulations of prohibited sexual acts are included as criminal conduct alongside the acts themselves. HB 65 simplifies 30-6A-2 and 30-6A-3 by including simulations in the definition of “prohibited sexual acts,” rather than piecemeal throughout the sections. Thus, the bill removes “simulation of such an act” from its language since the simulation of any of the acts is now included in the definitions section as a prohibited act.

The bill also removes “any” from the act and replaces it with “an” or “a,” thereby making it clear that each individual image or video of a child being sexually abused is a separate and independent chargeable crime, albeit within the discretion of the charging prosecutor as the individual images “may” be charged separately although not explicitly mandated by statute.

The bill adds a mandatory sentencing enhancement to each crime when the child victim is under the age of 13. The table below summarizes the crime as well as the mandatory enhancement for each crime. If the defendant is a youthful offender, under the Juvenile Code, then the enhancement is no longer mandatory, but discretionary.

Statute	Short Title	Basic Sentence (Status quo)	Child Victim Under 13 Enhancement (Proposed by HB 65)	Mandatory or Discretionary (Proposed by HB 65)	Youthful Offender – Mandatory or Discretionary
30-6A-3(A)	Possession	18 months	6 months	Mandatory	Discretionary
30-6A-3(B)	Distribution	36 months	18 months	Mandatory	Discretionary
30-6A-3(C)	Production	36 months			
30-6A-3(C) Under 13	Production (Under 13)	108 months	18 months	Mandatory	Discretionary
30-6A-3(D)	Manufacture	108 months	18 months	Mandatory	Discretionary
30-6A-3(E)	Manufacture (Simulated)	18 months	18 months	Mandatory	Discretionary
30-6A-3(F)	Distribution (Simulated)	36 months	12 months	Mandatory	Discretionary

FISCAL IMPLICATIONS

Not Applicable

SIGNIFICANT ISSUES

HB 65 is a response to the New Mexico Supreme Court’s clarion call to the New Mexico Legislature to clarify the legislative intent what constitutes a “visual or print medium” and more specifically the “unit of prosecution” in child exploitation cases, or cases concerning the visual depiction of children being forced into sexual acts.

Prior to 2014, state prosecutors could charge Child Exploitation by Possession in the manner proposed by subsection (H) of this legislation; each image constituted one count of Child Exploitation by Possession.

Post the Supreme Court’s decision in *State v. Olssen*, an offender could have 1 image or 10000 images and that offender can only be charged with one count of Child Exploitation by Possession, a fourth degree felony punishable by 18 months. Subsection (H) places New Mexico law back to the status quo of existing law prior to the *Olssen/Ballard* decisions.

Additionally, this bill adds an enhancement for individuals in possession of, distributing, or manufacturing images of children under the age of 13 by requiring a jury or judge to make a separate finding of fact as to the age of the child being sexually abused within an image. If an offender was found to be in possession, distributing, or manufacturing images of a child being sexually abused who was younger than 13, that offender would receive a minimum mandatory period of incarceration depending on the degree of felony he or she committed within the statute. Such a determination would be within the purview of a jury, such that consistent with U.S. Supreme Court decisions, the determination would remain a question of fact, unless of course, the offender would stipulate to such a finding via a condition of plea. The mandatory incarceration periods contemplated within HB 65 require offenders convicted of possessing,

distributing, or manufacturing images of pre-pubescent children being sexually abused to register as sex offenders, under New Mexico's Sex Offender Registration and Notification Act (SORNA), as sex-offender registration may not be imposed by a court if incarceration is not imposed or if an offender receives a conditional discharge. This bill would supplant existing law by indicating legislative intent to punish more harshly individuals possessing, distributing, or manufacturing images of pre-pubescent or infants and toddlers being sexually abused, highlighting associated risk-factors of offenders who collect, create, and distribute this type contraband from others within the statute, making it harmonize with federal statutes that criminalize such behavior.

The current versions of Sections 30-6A-2 and 30-6A-3 were recently interpreted by the New Mexico Supreme Court to be "insurmountably ambiguous", relating to what constitutes an individual act. Practically, this meant that the possession of a single image of child pornography was penalized identically as the possession of multiple images. The Supreme Court recommended a revision of the statute to clarify the legislature's intent. This bill likely clarifies this statute by amending the definitions of "visual or print medium" to penalize any single visual depiction separately, as well as including a catch-all in subsection (H) of 30-6A-3.

In calling for legislative review and evaluating arguments made by the defense and state, the Supreme Court noted that possession causes equal or greater harm than the original manufacture because it further disseminates the original trespass and stated that a unitary conduct analysis for possession is not likely what the Legislature intended because a defendant would have no incentive to stop downloading child pornography after the first image.

The root problem with the pre-existing statute under the Supreme Court's analysis was the definition of "visual or print medium." This bill not only clarifies legislative intent in the body of the statute under subsection (H), but fixes the perceived ambiguity in the definition of "visual or print medium," by adding the phrase "any single visual depiction of a prohibited sex act" under 30-6A-2 (B)(1) and (2) to the original language. It also adds the words "created or stored" to the definition, updating the original language to apply to offenders using a computer or electronic storage device to compile or develop a collection. The language under subsection (H) clarifies that **each** depiction of a child under eighteen years of age engaged in a prohibited sexual act contained on an item of visual or print medium shall be considered a distinct act and shall be charged as an individual act.

HB 65 does not require prosecutors to charge multiple possessions of each visual depiction independently. Nor does it require the sentences of the possession of multiple visual depictions to be imposed consecutively. Prosecutors and courts appear to retain charging and sentencing discretion under the plain language of the bill.

PERFORMANCE IMPLICATIONS

Not Applicable

ADMINISTRATIVE IMPLICATIONS

Not Applicable

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Not Applicable

TECHNICAL ISSUES

None.

OTHER SUBSTANTIVE ISSUES

Not Applicable

ALTERNATIVES

Not Applicable

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status Quo

AMENDMENTS